

## **Exhibit C**

### **Wyckoff/PSR – Bainbridge Island Prospective Purchaser Agreement**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10  
1200 Sixth Avenue  
Seattle, WA 98101

January 4, 2005

Reply To  
Attn Of: ECL 113

Ms. Libby Hudson  
Senior Planner  
City of Bainbridge Island  
280 Madison Ave North  
Bainbridge Island, WA 98110-1812

Re: Transmittal of Wyckoff/PSR -Bainbridge Island  
Prospective Purchases Agreement

Dear Libby:

Enclosed please find the above-referenced document which was signed by the U.S. Department of Justice on December 8, 2004.

Please let me know if I can provide additional information at this time.

Sincerely,

MJ Nearman  
Wyckoff/Eagle Harbor Project Manager

CORR LOG  
31087

CITY OF  
BAINBRIDGE ISLAND  
JAN 07 2005  
LHJF  
DEPT. OF PLANNING &  
COMMUNITY DEVELOPMENT

1  
2  
3 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

4 REGION 10  
5  
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7

8 IN THE MATTER OF:  
9 The former Wyckoff/PSR Facility  
10 Bainbridge Island, Washington, a portion  
of the Wyckoff/Eagle Harbor Superfund  
Site

EPA DOCKET NO. 10-2005-0051

11 UNDER THE AUTHORITY OF THE  
12 COMPREHENSIVE ENVIRONMENTAL  
RESPONSE, COMPENSATION, AND  
13 LIABILITY ACT OF 1980, 42 U.S.C.  
§ 9601, ET SEQ., AS AMENDED.

AGREEMENT AND COVENANT  
NOT TO SUE CITY OF  
BAINBRIDGE ISLAND

1  
2 I. INTRODUCTION

3 This Agreement and Covenant Not to Sue ("Agreement") is made and entered into by and  
4 between the United States on behalf of the Environmental Protection Agency ("EPA") and the City  
5 of Bainbridge Island ("City" or "Settling Respondent"). This Agreement is entered into pursuant to  
6 the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended  
7 ("CERCLA"), 42 U.S.C. §9601, et seq., and the authority of the Attorney General of the United  
8 States to compromise and settle claims of the United States.

9 The Trust For Public Land ("TPL"), working as a facilitator with the buyer and seller,  
10 negotiated an Option Agreement ("OA") dated April 11, 2003 ("Exhibit 1") under which TPL may  
11 purchase approximately 49.5 acres of the Wyckoff-Eagle Harbor Superfund Site ("Site") on  
12 Bainbridge Island, Washington (the "Property") in the years 2004-2006, or portions thereof,  
13 consistent with the OA. The Property is the former Wyckoff, a/k/a Pacific Sound Resources  
14 ("PSR"), wood treating facility, as legally described in the attached OA. TPL's goal, in accordance  
15 with the OA, is to simultaneously reconvey the Property to the extent acquired by TPL pursuant to  
16 the OA to the City for Park Use and Development Activities, as defined in Paragraph 3. The seller  
17 of the Property and the Parties herein agree that the City may join the OA as a party thereto and may  
18 directly purchase the Property or portions thereof, in accordance with the OA, without TPL.  
19 According to the Settling Respondent, TPL provides expertise in real property acquisition for public  
20 entities, including an established network for grants, fund raising and other support.

21 The Property is currently owned by PSR, formerly The Wyckoff Company. In 1994, PSR  
22 entered into a consent decree with the United States and tribal natural resource trustees pursuant to  
23 which it is required to liquidate all of its assets and transfer the proceeds into the PSR Environmental  
24 Trust ("Trust"). The PSR Environmental Trustee also serves as the Chief Executive and sole officer  
25 of PSR. Funds held by the Trust are, in accordance with the Consent Decree, dedicated for use by  
26 EPA and certain federal and tribal natural resource trustees to remediate contaminants of concern  
27 and restore natural resources at the Site and at the Pacific Sound Resources Superfund Site in West  
28 Wyckoff/PSR-Bainbridge Island Prospective Purchases Agreement - Page 2

1  
2 Seattle, Washington. Pursuant to the Consent Decree, proceeds from any sale of the Property by  
3 PSR shall be disbursed solely to EPA.

4       The Property was used for treating wood and related activities from the early 1900s until  
5 1994. Particularly the subsurface of a significant portion of the Property remains highly  
6 contaminated. EPA has spent approximately \$100 million dollars toward remediating the facility,  
7 including a recently completed experimental steam cleaning remedial action pilot project, and  
8 projects very significant future remedial action expenditures. Due to the highly contaminated nature  
9 of significant portions of the subsurface of the Property, associated contaminated off-shore  
10 sediments, associated remedial outcome uncertainties, and associated uncertainties regarding  
11 prospects for future redevelopment of the Property in its suburban-Seattle island location, its fair  
12 market value has been difficult to assess. The Trust and the City jointly commissioned the most  
13 current appraisal for the Property which arrived at a total fair market value of \$8 million. This  
14 appraisal was used to set the purchase for the Property in the OA. TPL will receive a professional  
15 services fee based on the amount of the Property purchased. This fee could range from \$207,500 to  
16 \$520,000, depending on how much property is purchased and when the purchase occurs. According  
17 to Settling Respondent, this fee is intended to reimburse TPL for its staff time and other costs related  
18 to the project. If all options are exercised, approximately \$7.5 million, minus taxes and closing  
19 costs, will be available for future remedial action at either or both Wyckoff/PSR Superfund Sites as  
20 the funds are paid in 2004-2006 in accordance with the OA. The OA represents the only outstanding  
21 viable offer for the Property to date. A Prospective Purchaser Agreement from the United States is a  
22 contingency of the OA.

23       The Settling Respondent agrees to undertake all actions required by the terms and conditions  
24 of this Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations  
25 and limitations contained in Sections VII, VIII, IX, and X, the potential liability of the Settling  
26 Respondent for the Existing Contamination at the Site that might otherwise result from Settling  
27 Respondent becoming the owner of the Property. The Settling Respondent's entry into this  
28 Wyckoff/PSR-Bainbridge Island Prospective Purchases Agreement - Page 3

1  
2 Agreement does not constitute an admission of any liability by the Settling Respondent or TPL. The  
3 resolution of this potential liability is in the public interest.  
4

## 5 II. DEFINITIONS

6 Unless otherwise expressly provided herein, terms used in this Agreement which are defined  
7 in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them  
8 in CERCLA or in such regulations, including any amendments thereto.

9 1. "EPA" shall mean the United States Environmental Protection Agency and any successor  
10 departments or agencies of the United States.

11 2. "Existing Contamination" shall mean:

12 a. any hazardous substances, pollutants or contaminants, present or existing on or  
13 under the Site as of the effective date of this Agreement;

14 b. any hazardous substances, pollutants or contaminants that migrated from the  
15 Property prior to the effective date of this Agreement;

16 c. any hazardous substances, pollutants or contaminants presently at the Site that  
17 migrate onto or under or from the Property after the effective date of this Agreement, unless  
18 migration is caused by, contributed to, or exacerbated by Settling Respondent; and

19 d. any hazardous substances, pollutants or contaminants at the Site originating  
20 outside the Property that have become commingled with hazardous substances, pollutants or  
21 contaminants within the scope of the foregoing subparagraphs a, b, and c of this Paragraph 2, unless  
22 such hazardous substances, pollutants or contaminants are released in whole or in part by Settling  
23 Respondent.

24 3. "Park Use and Development Activities" shall mean park use, development, construction,  
25 operation and maintenance, including but not limited to the following activities:

26 a. a war internment memorial, visitor and interpretation centers for the memorial and  
27 the former Wyckoff site, and public art or outdoor interpretation structures;

1  
2 b. accessory park buildings, roadways, parking lots, trails and pathways, a public  
3 dock, picnic areas, and related recreational uses.

4 4. "Parties" shall mean the United States on behalf of EPA and the Settling Respondent.

5 5. "Property" shall mean that portion of the Site, encompassing approximately 49.5 acres,  
6 that is described in Exhibit 1 of this Agreement.

7 6. "Site" shall mean the Wyckoff-Eagle Harbor Superfund Site, encompassing the Property,  
8 located on Creosote Place, Bainbridge Island, Kitsap County, Washington, and all areas, including  
9 tidelands, aquatic bedlands and sediments, on or to which hazardous substances and/or pollutants or  
10 contaminants have come to be located.

11 7. "Trust" shall mean the PSR Environmental Trust.

12 8. "United States" shall mean the United States of America, its departments, agencies, and  
13 instrumentalities.

### 14 III. STATEMENT OF FACTS

15 9. PSR's approximately 49.5-acre former wood treating facility is on the southeastern  
16 shoreline of Eagle Harbor on Bainbridge Island, Washington, a municipality. The facility has been  
17 divided into various operable units for EPA administrative purposes, which are among the operable  
18 units of the Wyckoff/Eagle Harbor Superfund Site which was listed on the National Priorities List  
19 ("NPL") on July 22, 1987, at 52 Fed. Reg. 27620.

20 10. Wood treating operations at the facility under various owners date back nearly a hundred  
21 years. The Wyckoff Company, a closely held Washington corporation, owned and operated the  
22 facility from December 1965 until operations ceased in 1994. In 1991, The Wyckoff Company  
23 changed its name to PSR, which is The Wyckoff Company's successor in every respect.

24 11. In August 1994, the United States entered a Consent Decree in the United States District  
25 Court for the Western District of Washington, Seattle Division under which the principals of PSR  
26 were released from personal liability in exchange for the transfer of all shares of PSR to the PSR  
27 Environmental Trust, an entity created by the Decree to liquidate all PSR assets for the benefit of

28 Wyckoff/PSR-Bainbridge Island Prospective Purchases Agreement - Page 5

1  
2 EPA and CERCLA Natural Resource Trustees.

3 12. Contaminants of concern in groundwater and soils at the Property are chemicals from  
4 wood treatment processes, primarily creosote-derived polycyclic aromatic hydrocarbons (PAHs),  
5 pentachlorophenol (PCP), aromatic carrier oils, and dioxin/furans. It is estimated that 1 million  
6 gallons of non-aqueous phase liquids (NAPL) still remain in the subsurface of the facility.  
7 Sediments in areas of Eagle Harbor are contaminated with PAHs and other organic compounds, as  
8 well as with metals, primarily mercury. The wood treating facility is the major source of PAHs to  
9 the East Harbor through both past operating practices and contaminant transport through the  
10 subsurface. An additional source of contaminants to Eagle Harbor was created when sludge from  
11 tanks and sumps was used as fill material between an old and new bulkhead at the facility in the  
12 1950s.

13 13. The remedial action objective for the Property is the removal and treatment or disposal  
14 of subsurface contaminants to the extent practicable, or containment thereof. EPA is still evaluating  
15 a recently completed pilot study to test the applicability and effectiveness of thermal remediation  
16 (steam injection with groundwater and contaminant extraction) which helped reveal numerous  
17 technical issues which must be addressed before full scale thermal remediation could be applied at  
18 the Site. In addition to any potentiality for full-scale thermal remediation, EPA anticipates  
19 implementation of surface capping as necessary, primarily over the Former Process Area, and  
20 containment of contaminated groundwater and NAPL with a vertical structure and extraction system,  
21 and construction of a new treatment plant for continued treatment of contaminated groundwater.

22 14. The primary remedial action objective for the East Harbor sediments is the achievement  
23 of Washington Sediment Quality Standards (SQS) and reduction of contaminants in fish and  
24 shellfish to levels protective of human health and the environment. Over 50 acres of heavily  
25 contaminated subtidal sediments in the East Harbor were capped to address adverse biological  
26 effects and free-phase oily contamination. Intertidal and upland sediments in the Former Log  
27 Storage/Peeler Area were capped or consolidated in the Former Process Area. EPA constructed a



1  
2 2-acre Habitat Mitigation Beach along the shoreline to mitigate for loss of intertidal areas adjacent to  
3 the Former Process Area. A sheet pile wall was constructed around the highly contaminated Former  
4 Process Area to minimize potential flow of contaminants to Eagle Harbor.

5 15. TPL is a private non-profit Internal Revenue Service Code 501(c)(3) organization, duly  
6 incorporated under the laws of the state of California. Settling Respondent City is a duly constituted  
7 municipality under the laws of the state of Washington.

8 16. Settling Respondent represents, and for the purposes of this Agreement EPA relies on  
9 such representations, that neither Settling Respondent nor TPL have had any involvement with the  
10 Property or the Site related to releases of any hazardous substances, pollutants, or contaminants, and  
11 have not caused or contributed to the release or threatened release of any hazardous substances,  
12 pollutants, or contaminants at the Site, and that Settling Respondent's and TPL's involvement with  
13 the Property has been limited to their role as prospective purchaser and purchase facilitator of the  
14 Property, respectively.

#### 15 IV. UNDERTAKINGS

16 17. In consideration of and in exchange for the United States' Covenant Not to Sue in  
17 Section VIII herein, Settling Respondent agrees that EPA may use well water from on-site well(s) as  
18 may be required for remedial purposes without cost or charge to the United States to the extent that  
19 the City has rights, authority or control of or to such water. EPA will use reasonable efforts to avoid  
20 material impacts to surrounding users, adjacent aquifers and existing City wells located in Taylor  
21 Avenue. The City will further provide public administrative and record keeping support through  
22 provision of a Superfund document archive at City Hall, and will provide public meeting space for  
23 EPA public outreach related to the Site.

#### 24 V. ACCESS/NOTICE TO SUCCESSORS IN INTEREST

25 18. Commencing upon the date that it acquires title to any portion of the Property, Settling  
26 Respondent agrees to provide, and ensures that TPL will provide, to EPA, its authorized officers,  
27 employees, representatives, and any persons performing response actions under EPA oversight, an

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2 irrevocable right of access to such portion(s) at all reasonable times and to any other property to  
3 which access is required for the implementation of response actions at the Site, to the extent access  
4 to such other property is controlled by Settling Respondent, for the purposes of conducting response  
5 actions at the Site under federal law. EPA agrees to provide reasonable notice to Settling  
6 Respondent of the timing of response actions to be undertaken at the Property. Notwithstanding any  
7 provision of this Agreement, EPA retains all of its access authorities and rights, including  
8 enforcement authorities related thereto, under CERCLA, the Solid Waste Disposal Act, as amended  
9 by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, ("RCRA") et. seq., and any  
10 other applicable statute or regulation, including any amendments thereto.

11 19. With respect to any portion of the Property acquired pursuant to the OA, the Settling  
12 Respondent shall execute and record either Exhibit 2 ("EPA Access Rights, Covenants and Use  
13 Restrictions, a/k/a 'Institutional Controls'"), or a document approved by EPA which sets forth the  
14 institutional controls and land use restrictions and/or limitations selected to date in Exhibit 2 in the  
15 Recorder's Office of Kitsap County, State of Washington. Within 30 days of recording, the Settling  
16 Respondent shall provide EPA with a certified copy of the original recorded document showing the  
17 clerk's recording stamps. The City further acknowledges that subsequent institutional controls may  
18 be developed and selected by EPA in future Record(s) of Decision (ROD) or ROD Amendment(s),  
19 and the City agrees, in accordance with this Paragraph, to implement such institutional controls in  
20 the form of use restrictions and/or limitations which may require recording in a manner substantially  
21 similar to that set forth in this Paragraph. The City is not obligated under this Agreement to provide  
22 funds, materials, supplies or personnel for implementation or completion of any other remedial  
23 action at the Site, except as may be required in response to exacerbation of Existing Contamination  
24 or releases of contaminants consistent with the Reservation of Rights in Section IX of this  
25 Agreement. All future EPA remedial action decisions, including those selecting institutional  
26 controls the City has agreed to implement, shall be subject to the public comment and participation  
27 processes set forth in Section 117 of CERCLA and in the National Contingency Plan ("NCP") at 40  
28 Wyckoff/PSR-Bainbridge Island Prospective Purchases Agreement - Page 8

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2 C.F.R. 300.430(f)(3)-(6).

3 20. Settling Respondent shall ensure that any successor entity(ies) in interest, lessees, and  
4 sublessees of any portion of the Property that Settling Respondent acquires shall provide the same  
5 access and cooperation. Settling Respondent shall ensure that a copy of this Agreement is provided  
6 to any current lessee or sublessee on any such portion of the Property as of the effective date of this  
7 Agreement and shall ensure that any subsequent leases, subleases, assignments of or successions to  
8 any such portion of the Property or an interest in the Property are consistent with this Section and  
9 Section XI (Parties Bound/Transfer of Covenant) of the Agreement.

10 VI. DUE CARE/COOPERATION

11 21. Settling Respondent shall exercise due care at the Site with respect to the Existing  
12 Contamination and shall comply with all applicable local, State, and federal laws and regulations. In  
13 order to minimize or eliminate potential adverse environmental consequences related to Park Use  
14 and Development Activities, the City will confer with EPA consistent with Exhibit 2. However,  
15 such conferral shall not be construed as approval or acceptance by EPA of any Park Use or  
16 Development Activities or other improvements, and any exacerbation of Existing Contamination or  
17 any releases of contaminants as a result of such activities may result in environmental liability for the  
18 City, consistent with the Reservation of Rights Section of this Agreement, as well as for any other  
19 responsible parties. The Settling Respondent further recognizes that the implementation of response  
20 actions at the Site may interfere with its use of the Property. The Settling Respondent agrees to  
21 cooperate fully with EPA in the implementation of response actions at the Site and further agrees not  
22 to interfere with such response actions. EPA agrees, consistent with its responsibilities under  
23 applicable law, to cooperate with the City and to use reasonable effort: 1) to minimize any  
24 interference with the Settling Respondent's use of the Property by such entry and response; 2) to use  
25 Creosote Place as the primary means of entry and access, except when in EPA's discretion  
26 environmental response activities may be more effectively or efficiently implemented by alternative  
27 entry and/or access; and 3) not to jeopardize, undermine or materially damage Park Use and

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2 Development Activities on the Property. In the event that Settling Respondent becomes aware of  
3 any action or occurrence that causes or threatens a release of hazardous substances, pollutants or  
4 contaminants at or from the Property that constitutes an emergency situation or may present an  
5 immediate threat to public health or welfare or the environment, Settling Respondent shall  
6 immediately take all appropriate action to prevent, abate, or minimize such release or threat of  
7 release, and shall, in addition to complying with any applicable notification requirements under  
8 Section 103 of CERCLA, 42 U.S.C. §9603, or any other law, immediately notify EPA of such  
9 release or threatened release.

## 10 VII. CERTIFICATION

11 22. By entering into this agreement, Settling Respondent certifies that to the best of its  
12 knowledge and belief it has fully and accurately disclosed to EPA all information known to Settling  
13 Respondent and TPL and all information in the possession or control of its officers, directors,  
14 employees, contractors and agents that relates in any way to any Existing Contamination or any past  
15 or potential future release of hazardous substances, pollutants or contaminants at or from the Site and  
16 to its qualification for this Agreement. Settling Respondent also certifies that to the best of its  
17 knowledge and belief neither it nor TPL has caused or contributed to a release or threat of release of  
18 hazardous substances or pollutants or contaminants at the Site. If the United States determines that  
19 information provided by Settling Respondent is not materially accurate and complete, this  
20 Agreement, within the sole discretion of the United States, shall be null and void and the United  
21 States reserves all rights it may have.

## 22 VIII. UNITED STATES' COVENANT NOT TO SUE

23 23. Subject to the Reservation of Rights in Section IX of this Agreement, the United States  
24 covenants not to sue or take any other civil or administrative action against Settling Respondent for  
25 and to the extent Settling Respondent acquires Property pursuant to the OA (or from TPL after TPL  
26 has so acquired such Property), and this Agreement for any and all civil liability for injunctive relief  
27 or reimbursement of response costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§

1  
2 9606 or 9607(a) with respect to the Existing Contamination.

3 IX. RESERVATION OF RIGHTS

4 24. The covenant not to sue set forth in Section VIII above does not pertain to any matters  
5 other than those expressly specified in Section VIII (United States' Covenant Not to Sue). The  
6 United States reserves and the Agreement is without prejudice to all rights against Settling  
7 Respondent with respect to all other matters, including but not limited to, the following:

8 (a) claims based on a failure by Settling Respondent to meet a requirement of this  
9 Agreement, including but not limited to Section IV (Undertakings), Section V (Access/Notice to  
10 Successors in Interest), Section VI (Due Care/Cooperation), Section XIV (Payment of Costs);

11 (b) any liability resulting from past or future releases of hazardous substances, pollutants or  
12 contaminants, at or from the Site caused or contributed to by Settling Respondent, its successors,  
13 assignees, lessees or sublessees or TPL;

14 (c) any liability resulting from exacerbation by Settling Respondent, its successors, assignees,  
15 lessees or sublessees, or TPL, of Existing Contamination;

16 (d) any liability resulting from the release or threat of release of hazardous substances,  
17 pollutants or contaminants, at the Site after the effective date of this Agreement, not within the  
18 definition of Existing Contamination;

19 (e) criminal liability;

20 (f) liability for damages for injury to, destruction of, or loss of natural resources, and for the  
21 costs of any natural resource damage assessment incurred by federal agencies other than EPA; and

22 (g) liability for violations of local, State or federal law or regulations.

23 25. With respect to any claim or cause of action asserted by the United States, the Settling  
24 Respondent shall bear the burden of proving that the claim or cause of action, or any part thereof, is  
25 attributable solely to Existing Contamination.

26 26. Nothing in this Agreement is intended as a release or covenant not to sue for any claim  
27 or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity,

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1  
2 which the United States may have against any person, firm, corporation or other entity not a party to  
3 this Agreement.

4 27. Nothing in this Agreement is intended to limit the right of EPA to undertake future  
5 response actions at the Site or to seek to compel parties other than the Settling Respondent to  
6 perform or pay for response actions at the Site. Nothing in this Agreement shall in any way restrict  
7 or limit the nature or scope of response actions which may be taken or be required by EPA in  
8 exercising its authority under federal law. Settling Respondent acknowledges it is purchasing  
9 options to purchase Property or may receive Property where response actions may be required.

#### 10 X. SETTLING RESPONDENT'S COVENANT NOT TO SUE

11 28. In consideration of the United States' Covenant Not To Sue in Section VIII of this  
12 Agreement, the Settling Respondent hereby covenants not to sue and not to assert any claims or  
13 causes of action against the United States, its authorized officers, employees, or representatives with  
14 respect to the Site or this Agreement, including but not limited to, any direct or indirect claims for  
15 reimbursement from the Hazardous Substance Superfund established pursuant to the Internal  
16 Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113, or any other  
17 provision of law, any claim against the United States, including any department, agency or  
18 instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or any  
19 claims arising out of response activities at the Site, including claims based on EPA's oversight of  
20 such activities or approval of plans for such activities.

21 29. The Settling Respondent reserves, and this Agreement is without prejudice to, actions  
22 against the United States based on negligent actions taken directly by the United States, not  
23 including oversight or approval of either Settling Respondent's plans or activities, that are brought  
24 pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign  
25 immunity is found in a statute other than CERCLA or RCRA. Nothing herein shall be deemed to  
26 constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. §  
27 9611, or 40 C.F.R. § 300.700(d).

1  
2 XI. PARTIES BOUND/TRANSFER OF COVENANT

3 30. This Agreement shall apply to and be binding upon the United States, and shall apply to  
4 and be binding upon the Settling Respondent, its officers, directors, officials, agents and employees.  
5 The United States' Covenant Not to Sue in Section VIII and Contribution Protection in Section XVIII  
6 shall apply to Settling Respondent's officers, directors, officials, agents or employees to the extent  
7 that the alleged liability of such person is based on his/her status and in his/her capacity as an officer,  
8 director, or employee of Settling Respondent, and not to the extent that the alleged liability arose  
9 independently of the alleged liability of Settling Respondent. Each signatory of a Party to this  
10 Agreement represents that he or she is fully authorized to enter into the terms and conditions of this  
11 Agreement and to legally bind such Party.

12 31. EPA hereby consents to the assignment or transfer of the rights and obligations of the  
13 Settling Respondent under this Agreement to the Bainbridge Island Park and Recreation District  
14 (BIPRD), a duly constituted municipality under the laws of the state of Washington, or to the  
15 National Park Service of the United States (NPS), or upon EPA approval in writing of such an entity,  
16 potentially to a third as yet unidentified substantially similar public entity, in connection with and for  
17 the purpose of developing or operating the Property as a park, and no further consent of EPA is  
18 required for purposes of this Paragraph. Except for a transfer to one of the entities described in this  
19 Paragraph, no rights, benefits and obligations conferred upon Settling Respondent under this  
20 Agreement shall pass to any subsequent purchaser or other grantee of the Property or any portion  
21 thereof. Such subsequent purchaser or grantee may seek an Agreement and Covenant Not to Sue  
22 from the United States, or may elect to avail itself of the provisions of the Small Business Liability  
23 Relief and Brownfields Revitalization Act of 2001.

24 32. In the event of a transfer of any portion of the Property acquired by Settling Respondent  
25 pursuant to the OA (or from TPL pursuant to the OA) to the one of the entities described in  
26 Paragraph 31 above, such entity shall continue to be bound by all the terms and conditions, and  
27 subject to all the benefits, of this Agreement except as EPA and such entity may agree otherwise and

1  
2 modify this Agreement, in writing, accordingly.

3 33. Prior to or simultaneous with any such transfer, the BIPRD, NPS or EPA-approved third  
4 entity described in Paragraph 31 above, must consent in writing to be bound by the terms of this  
5 Agreement including but not limited to the certification requirement in Section VII of this  
6 Agreement in order for the Covenant Not to Sue in Section VIII to be available to such entity. The  
7 Covenant Not To Sue in Section VIII shall not be effective with respect to such entity if such entity  
8 fails to provide such written consent to EPA.

#### 9 XII. DISCLAIMER

10 34. This Agreement in no way constitutes a finding by EPA as to the risks to human health  
11 and the environment which may be posed by contamination at any portion of the Property or the Site,  
12 nor constitutes any representation by EPA that any portion of the Property or the Site is fit for any  
13 particular purpose.

#### 14 XIII. DOCUMENT RETENTION

15 35. Settling Respondent agrees to retain and, subject to any and all rights and protections that  
16 may be asserted by or afforded to Settling Respondent based on attorney-client, work product,  
17 business propriety, trademark, and/or confidentiality protections and/or privileges, to make available  
18 to EPA all business and operating records, contracts, Site studies and investigations, and other  
19 documents relating to releases or threatened releases of hazardous substances at any portion of the  
20 Property acquired pursuant to the OA for at least ten years following the effective date of this  
21 Agreement unless otherwise agreed to in writing by EPA. At the end of ten years, the Settling  
22 Respondent shall notify EPA of the location of such documents and shall provide EPA with an  
23 opportunity to copy any documents at the expense of EPA.

#### 24 XIV. PAYMENT OF COSTS

25 36. If Settling Respondent fails to comply with the terms of this Agreement, including, but  
26 not limited to, the provisions of Section IV (Undertakings) of this Agreement, it shall be liable for all  
27 litigation and other enforcement costs incurred by the United States to enforce this Agreement or



1  
2 otherwise obtain compliance.

3 XV. NOTICES AND SUBMISSIONS

4 37. All notices and submissions required under this Agreement shall be sent to the  
5 following:

6 MaryJane Nearman  
7 Remedial Project Manager  
8 United States Environmental Protection Agency  
9 Region X, M/S ECL-113  
10 1200 Sixth Avenue  
11 Seattle, Washington 98101

12 XVI. EFFECTIVE DATE

13 38. The effective date of this Agreement shall be the date upon which EPA issues written  
14 notice to the Settling Respondent that the United States has fully executed this Agreement. The  
15 effective date of the rights, benefits and obligations of this Agreement for Settling Respondent shall  
16 be the date of the legal transfer of title to any portion(s) of the Property, in accordance with the OA  
17 and this Agreement, to Settling Respondent, and such benefits shall extend only to such legally  
18 transferred portion(s) upon transfer.

19 XVII. TERMINATION

20 39. If Settling Respondent believes that any or all of the obligations under Section V  
21 (Access/Notice to Successors in Interest) are no longer necessary to ensure compliance with the  
22 requirements of the Agreement, Settling Respondent may request in writing that EPA agree to  
23 terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in  
24 question shall continue in force unless and until Settling Respondent receives written agreement  
25 from EPA to terminate such provision(s).

26 XVIII. CONTRIBUTION PROTECTION

27 40. With regard to claims for contribution against Settling Respondent, the Parties hereto  
28 agree that the Settling Respondent is entitled to protection from contribution actions or claims as  
provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this

1  
2 Agreement. The matters addressed in this Agreement are all response actions taken or to be taken  
3 and response costs incurred or to be incurred by the United States, the State of Washington, or any  
4 other person for the Site with respect to the Existing Contamination.

5 41. Settling Respondent agrees that with respect to any suit or claim for contribution brought  
6 by it for matters related to this Agreement it will notify the United States in writing no later than 60  
7 days prior to the initiation of such suit or claim.

8 42. Settling Respondent also agrees that with respect to any suit or claim for contribution  
9 brought against it for matters related to this Agreement it will notify in writing the  
10 United States within 10 days of service of the complaint on it.

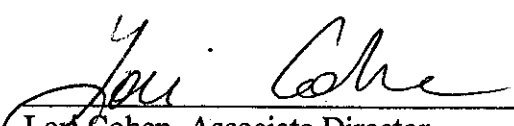
11 XIX. EXHIBITS

12 43. Exhibit 1 shall mean the Option Agreement dated April 11, 2003.  
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1           44. Exhibit 2 shall mean the document entitled, EPA Access Rights, Covenants and Use  
2 Restrictions, a/k/a Institutional Controls.

3  
4 IT IS SO AGREED:

5 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
6 BY:

7  
8   
9 Lori Cohen, Associate Director  
Environmental Cleanup Office, Region X

11/1/04  
Date

10

11

12

13 IT IS SO AGREED:

14 UNITED STATES DEPARTMENT OF JUSTICE  
15 BY:

15

16   
17 Thomas L. Sansonetti

12.8.04  
Date

18 Assistant Attorney General  
19 Environment and Natural Resources Division  
20 U.S. Department of Justice

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3 IT IS SO AGREED:

4 CITY OF BAINBRIDGE ISLAND

5 BY:

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Darlene Kordonowy

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Mayor

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City of Bainbridge Island

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Date

# DUPLICATE ORIGINAL

## OPTION AGREEMENT

This is an Agreement dated as of April 11, 2003, between Pacific Sound Resources ("Seller"), and The Trust for Public Land, a California nonprofit public benefit corporation ("Buyer").

RECEIVED

### RECITALS

JUN 8 2003

A. The addresses and telephone numbers of the parties to this Agreement are as follows. Telephone numbers are included for information only.

OFFICE OF REGIONAL COUNSEL  
EPA REGION 9

#### SELLER:

Pacific Sound Resources  
  
c/o Daniel Silver  
421 S. Capitol Way, Suite 303  
Olympia, Washington 98501  
Tel: (360) 754-9343

#### BUYER:

The Trust for Public Land  
1011 Western Avenue, Suite 605  
Seattle, WA 98104  
Attn: Kent Whitehead  
Thomas E. Tyner  
Tel: (206) 587-2447  
FAX: (206) 382-3414

B. Seller is the owner of certain real property in Kitsap County, Washington, described on Exhibit A attached to this Agreement and hereby incorporated by this reference.

Said real property, which comprises forty nine and a half (49.5) acres, more or less, together with any and all improvements, fixtures, timber, water and minerals located thereon and any and all rights appurtenant thereto including but not limited to timber rights, water rights, grazing rights, access rights and mineral rights, other than those improvements and fixtures which have been installed and operated by the United States Environmental Protection Agency ("EPA") as part of the environmental remediation of said real property, and subject to the reservation of rights and use restrictions which may be placed on the real property as part of the continuing environmental remediation under the direction of EPA, all as discussed in more detail below. Said real property together with the appurtenant rights enumerated in the proceeding sentence shall be referred to in this Agreement as the "Subject Property." For the purposes of this Agreement, the Subject Property shall consist of those four parcels identified on the map attached to this Agreement as Exhibit B and hereby incorporated by this reference, which four parcels may be referred to in this Agreement as "Block A", "Block B", "Block C1" and "Block C2", respectively.

C. It is the Buyer's intention that the Subject Property be preserved and used eventually for public, open space and recreational purposes. However, this intention shall not be

construed as a covenant or condition to this Agreement. Buyer makes no representation that any efforts it may undertake to secure the eventual government acquisition of the Subject Property will be successful.

D. Seller acknowledges that Buyer is entering into this Agreement in its own right and that Buyer is not an agent of any governmental agency or entity.

## THE PARTIES AGREE AS FOLLOWS:

### AGREEMENT

1. **Option.** In consideration of the payment by Buyer to Seller of the option consideration described below, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller grants to Buyer, subject to all the terms and conditions hereof, an exclusive and irrevocable option to purchase the Subject Property on the terms and conditions set forth in this Agreement (the "Option").

2. **Term.**

(a) **The Initial Option Term.** The Option shall be effective as of the date the Agreement is last signed (the "Effective Date") and shall expire on June 30, 2004 (the "Initial Option Term") unless otherwise previously terminated as provided below.

(b) **The First Extended Option Term.** Provided Buyer has complied with the terms of this Agreement, including, but not limited to timely making all of the Option consideration payments described below and exercising the Option and closing on the purchase as to at least a portion of the Subject Property as described below, then, upon the expiration of the Initial Option Term, Buyer may extend the term of the Option as to the balance of the Subject Property for an additional period through June 30, 2005 (the "First Extended Option Term") by so notifying Seller in writing on or prior to the expiration of the Initial Option Term.

(c) **The Second Extended Option Term.** Provided Buyer has complied with the terms of this Agreement, including, but not limited to timely making the Option consideration payments described below and exercising the Option and closing on the purchase as to at least the minimum portions of the Subject Property as described below, then, upon the expiration of the First Extended Option Term, Buyer may again extend the term of the Option as to any remaining portion of the Subject Property for an additional period through June 30, 2006 (the "Second Extended Option Term") by so notifying Seller in writing on or prior to the expiration of the First Extended Option Term.

3. **Purchase Terms.**

(a) **Price.** In the event that Buyer exercises the Option, Seller shall sell to Buyer and Buyer shall buy from Seller the Subject Property for a purchase price equal to Eight Million Dollars (\$8,000,000.00) (the "Purchase Price"), allocated as follows:

	Location	Approx. Area	Price
Block A	West End	18 acres	\$4,600,000
Block B	East End	24.5 acres	\$2,500,000
Block C1	Southwest End	2.5 acres	\$300,000
Block C2	Southeast End	4.5 acres	\$600,000
<b>Total</b>		<b>49.5 acres</b>	<b>\$8,000,000</b>

(b) **Method of Payment.** The Purchase Price shall be payable in cash on the close of escrow.

(c) **Purchase Price Adjustment.** If Buyer elects to purchase the Subject Property in more than one phase, then the allocated Purchase Price for each of the Blocks as set forth above will be adjusted each year beginning in 2005. The adjustment will consist of an annual increase of three percent (3%) in the Purchase Price of any portion of the Subject Property not purchased prior to January 1, 2005 calculated on a non-compounded basis from January 1, 2003 to the date of closing. If Buyer purchases some or all of the Subject Property after January 1, 2005, the adjusted purchase price for that portion of the Subject Property purchased will be prorated as of the date that the purchase actually closes. By way of example, if the Purchase Price of the portions of the Subject Property not purchased by December 31, 2004 is One Million Dollars (\$1,000,000.00), then the adjusted Purchase Price for that property beginning January 1, 2005 would be One Million Ninety Thousand Dollars (\$1,090,000.00) (three percent times the value of all such unpurchased property calculated from January 1, 2003 to December 31, 2005) if Buyer closes on the purchase of the remaining property on December 31, 2005. However, if Buyer closes on the purchase of all that remaining property on July 1, 2005, then the final adjusted Purchase Price would be One Million Seventy Five Thousand Dollars (\$1,075,000.00) (the full \$30,000.00 in increased value added for both the years 2003 and 2004 but the 2005 increase being prorated over number of actual days of the year that have passed prior to closing).

(d) **Purchase in Phases.** Buyer may purchase the Subject Property in one or more phases, provided, however, that if Buyer elects to purchase the Subject Property in phases, the phases shall consist of one of the following combinations of Blocks at the specified purchase prices:

Blocks Purchased	Price
Block A	\$4,600,000
Block B	\$2,500,000
Blocks A & B	\$7,100,000
Blocks A & C1	\$4,900,000

Blocks A, C1 and C2	\$5,500,000
Blocks A, B, and C1	\$7,400,000
Blocks A, B, C1 and C2	\$8,000,000

On or before the expiration of the Initial Option Term, Buyer may exercise the Option as to all of the Subject Property or as to one or more Blocks of the Subject Property as set forth above, provided, however, that Buyer must exercise the Option as to at least Block A of the Subject Property. If Buyer fails to exercise the Option as to at least Block A of the Subject Property on or before the end of the Initial Option Term, or if Buyer following exercise, fails without legal excuse to close the purchase of Block A, then this Agreement shall terminate and Buyer shall have no further rights to any of the Subject Property.

In addition, if prior to the expiration of the Initial Option Term Buyer elects to exercise the Option as to both Block A and Block B, then, on or before the expiration of the First Extended Option Term, Buyer may only exercise its Option as to both remaining Blocks C1 and C2 (rather than exercising the Option as to Block C1 during the First Extended Option Term and then exercising the Option as to Block C2 during the Second Extended Option Term).

Buyer and Seller shall cooperate in order to complete any necessary lot line adjustment, subdivision or tax parcel segregation (a "Parcel Segregation") in order to segregate the relevant Blocks of the Subject Property so that any portion of the Subject Property conveyed by Seller or any portion of the Subject Property retained by Seller are lawful, segregated parcels. In the event the parties are diligently pursuing a Parcel Segregation but said Parcel Segregation is not completed by the date otherwise established for closing, the closing date shall be extended for such period as necessary, not to exceed 180 days, to complete the Parcel Segregation.

If Buyer purchases the Subject Property in phases as described above, then all references in this Agreement to the terms "Subject Property" and "Purchase Price" shall be deemed to refer to both the entire Subject Property and to that particular phase being purchased by Buyer as the context requires. The terms and condition of this Agreement shall apply to each phase of the purchase.

(d) **Payment of Option Consideration.** All Option consideration paid by Buyer to Seller under this Agreement shall be credited toward the Purchase Price if Buyer exercises the Option, but shall otherwise be nonrefundable except as specifically set forth below. If Buyer has paid Option consideration to Buyer and the Option Agreement terminates for any reason (other than Seller's failure or refusal without valid legal excuse to complete the transactions contemplated by this Agreement), then Seller shall retain all such Option consideration paid by Buyer. Buyer shall pay Seller consideration for the Option as follows:

(i) **The Initial Option Term.** Buyer shall pay Seller the sum of Four Hundred Thousand Dollars (\$400,000.00), payable as follows:



(aa) Sixty Five Thousand Dollars (\$65,000.00) on or before July 1, 2003;

(bb) One Hundred Thirty Five Thousand Dollars (\$135,000.00) on or before December 31, 2003; and

(cc) Two Hundred Thousand Dollars (\$200,000.00) on or before July 1, 2004.

(ii) **The First and Second Extended Option Terms.** Buyer shall pay Seller Option consideration for both the First and the Second Extended Option Terms in an amount equal to two and a half percent (2.5%) of the aggregate Purchase Price for those remaining Blocks of the Subject Property which Buyer has not yet purchased. The Option consideration for the First and Second Extended Option Terms shall be payable in four equal quarterly installments due January 2, April 1, July 1 and October 1 of 2005 and 2006. By way of example, if Buyer had exercised the Option during the Initial Option Term as to all of the Subject Property except a portion having a remaining Purchase Price of One Million Dollars (\$1,000,000.00), then the option consideration payable for the First Extended Option Term would be Twenty Five Thousand Dollars (\$25,000.00) (2.5% times the remaining Purchase Price), and Buyer would pay Seller such additional Option consideration in four equal quarterly installments of Six Thousand Two Hundred Fifty Dollars (\$6,250.00).

e) **Refund of Option Consideration.** All Option consideration shall be nonrefundable provided Seller complies with its obligations under this Agreement, except that Seller shall promptly refund to Buyer all Option consideration paid by Buyer to Seller under this Agreement if (a) Seller is unable to deliver title to the Subject Property in conformance with the requirements of Section 6 below to Buyer at closing; or (b) Buyer (or Buyer's successor in interest) does not obtain from EPA a prospective purchaser agreement or its equivalent in a form acceptable to Buyer (or Buyer's successor in interest) as described in Section 29 below.

4. **Exercise.** In the event Buyer elects to exercise the Option, it shall do so by notifying Seller in writing within the term specified in Section 2. Such notice shall indicate that portion of the Subject Property to which Buyer is exercising the Option, and shall be deemed timely if it is transmitted by confirmed facsimile, deposited in the mail, first class postage prepaid, or delivered personally by courier or Express Mail within the term specified in Section 2. Buyer shall make a good faith effort to exercise its Option sooner rather than later during the term of the Option, and will let Seller know immediately if in Buyer's best professional judgment it is not likely that Buyer will be in a position to exercise the Option during the term of the Option.

5. **Escrow and Closing.** Upon Buyer's exercise of the Option, or at any earlier time as may be convenient, the parties shall open an escrow with Pacific Northwest Title Insurance Company of Kitsap County, Silverdale, Washington, to serve as the escrow holder (the "Escrow Holder"), for the purpose of closing the purchase and sale of the Subject Property. If Buyer exercises the Option as to the entire Subject Property, then escrow shall close on a date set forth

in a written notice to Buyer from Seller which shall be not less than thirty (30) days from said notice but in any event no later than December 31, 2004. If Buyer elects to purchase the Subject Property in phases as described above, the escrow for each of the phases shall close on a date set forth in a written notice to Buyer from Seller which shall be not less than thirty (30) days from said notice but in any event no later than the December 31 of the year in which the term of the option for that year expires (i.e., December 31, 2004, December 31, 2005 and December 31, 2006, respectively). If Buyer has exercised the Option as to all or any portion of the Subject Property, but fails without valid legal excuse to close on the purchase of the relevant portion of the Subject Property within the timeframe set forth above, then this Agreement shall immediately terminate, and Buyer shall have no further rights with respect to the Subject Property.

6. **Title.** Within thirty (30) days after mutual execution and delivery of this Agreement, Seller shall provide Buyer with a preliminary commitment to insure an ALTA standard owner's policy of title insurance relating to the Subject Property (the "Commitment"), together with complete and legible copies of all exceptions and encumbrances noted thereon. The Commitment shall be issued by Pacific Northwest Title Insurance Company of Kitsap County, Silverdale, Washington (the "Title Company"). Buyer shall have thirty (30) days after receipt of the Commitment (the "Title Review Period") to advise Seller in writing of any encumbrance, restrictions, easement or other matters shown on the Commitment (collectively "Exceptions") to which Buyer objects. Except as otherwise provided for below, all Exceptions to which Buyer does not object in writing prior to the expiration of the Title Review Period shall be deemed accepted by Buyer.

If Buyer timely objects to any Exceptions, then Seller shall advise Buyer in writing within thirty (30) days after receipt of Buyer's written objections: (a) which Exceptions Seller will remove at Closing, (b) which exceptions the Title Company has agreed to remove from the title policy to be issued at Closing, and (c) which Exceptions will not be removed by Seller or the Title Company. If Seller does not otherwise give an adequate, complete, timely and written notice to Buyer regarding any Exception to which Buyer has timely objected, then Seller shall be deemed to have given notice to Buyer that such Exception will not be removed by Seller or the Title Company at or prior to Closing.

Within thirty (30) days after Seller's receipt of Buyer's written objections, if Seller has not agreed to remove all Exceptions to which Buyer objects, Buyer shall notify Seller in writing of Buyer's election to either (a) terminate this Agreement, or (b) waive its objections to the Exceptions that Seller will not remove or cause the Title Company to insure around, in which event such Exceptions shall be deemed to be accepted by Buyer. If Buyer does not terminate this Agreement in writing within the thirty (30) day period, then Buyer shall be deemed to have waived its objections to the Exceptions that Seller will not remove or cause the Title Company to insure around.

Buyer acknowledges that the EPA is engaged in an active remediation effort on portions of the Subject Property, and that following closing the EPA will need to continue to have access to portions of the Subject Property in order to carry out its remediation activities. In addition, Buyer acknowledges that until such remediation efforts are completed, portions of the Subject Property will be subject to use restrictions, and that portions of the Subject Property may be

subject to permanent covenants and use restrictions. Buyer, EPA and Seller will cooperate to attempt to develop mutually acceptable instruments (the "EPA Access Rights, Covenants and Use Restrictions") within the time period specified in Section 29 below to reflect the need for access and use restrictions on the Subject Property, and such encumbrances on the Subject Property shall be deemed to be Permitted Exceptions.

All exceptions approved or deemed approved by Buyer under this Section, together with all matters that would have been disclosed by an inspection or ALTA survey of the Subject Property, and all other matters approved by Buyer under this Agreement shall be "Permitted Exceptions."

At Closing, Seller shall convey the Subject Property to Buyer or to Buyer's designee by means of a Bargain and Sale deed subject only to the Permitted Exceptions.

7. **Title Insurance.** Seller shall provide Buyer with an ALTA standard coverage owner's policy of title insurance in the amount of the Purchase Price insuring that title to the Subject Property is vested in Buyer upon close of escrow subject only to the Permitted Exceptions. Buyer may elect to obtain an extended coverage policy or any endorsements, provided Buyer shall be responsible for any and all survey costs and any additional premiums required for such extended coverage or endorsements.

8. **Seller's Preclosing Covenants.** Seller shall not, without the prior written consent of Buyer, which consent will not be unreasonably withheld, make, extend or permit any leases, contracts, mortgages or other liens or encumbrances affecting the Subject Property which will not be removed, released or terminated at closing except to resolve outstanding issues with the City of Bainbridge Island regarding the water tower located on Block C2 and a possible well protection easement on Block A for the City's Taylor Avenue well. Buyer and Seller acknowledge that EPA is involved in active remediation of portions of the Subject Property, and that nothing in this Paragraph shall be deemed to prohibit, restrict or limit in any way Seller's or EPA's on-going activities in this regard.

9. **Seller's Representations.** Seller makes the following representations and warranties:

(a) Seller has full power and authority to enter into this Agreement, and will have full power and authority to transfer and convey all right, title and interest in and to the Subject Property in accordance with this Agreement, subject to the approval of the EPA as described herein.

(b) Within Seller's knowledge, there is no suit, action, arbitration, legal, administrative or other proceeding or inquiry pending or threatened against the Subject Property, or any portion thereof, or pending or threatened against Seller which could affect Seller's title to the Subject Property, or any portion thereof, or subject an owner of the Subject Property, or any portion thereof, to liability except with regard to the environmental contamination at the site which shall be addressed as provided in Section 29 below.

(c) Within Seller's knowledge, there are no:

(i) Intended public improvements or private rights which will result in the creation of any liens upon the Subject Property or any portion thereof other than outstanding issues with the City of Bainbridge Island regarding the water tower located on Block C2 and a possible well protection easement on Block A for the City's Taylor Avenue well and the rights of access, control and use of the EPA to conduct the on-going environmental remediation.

(ii) Uncured notices which have been served upon Seller from any governmental agency notifying Seller of any violations of law, ordinance, rule or regulation which would affect the Subject Property or any portion thereof other than with respect to the environmental contamination under remediation by EPA.

(d) Within Seller's knowledge, there is no lease, license, permit, option, right of first refusal or other agreement, except as may be disclosed in the Commitment, which affects the Subject Property or any portion thereof and which will not be removed at closing other than the rights of access, control and use of the EPA to conduct the on-going environmental remediation.

(e) Neither the grant nor the exercise of the Option will constitute a breach or default under any agreement to which Seller is bound and/or to which the Subject Property is subject.

Each of the above representations and warranties is material and is relied upon by Buyer. Each of the above representations, unless corrected, supplemented or repudiated by Seller as provided for below prior to the close of escrow, shall be deemed to have been made as of the close of escrow and shall survive the close of escrow for a period of one (1) year following the close of escrow. Any claim which Buyer may have at any time for a breach of any such representation or warranty, whether known or unknown, which is not asserted by written notice to Seller within such one (1) year period shall not be valid or effective, and the Seller shall have no liability with respect thereto.

If, before the close of escrow, Seller discovers any information or facts that would materially change the foregoing representations and warranties (an "Exception Matter"), Seller shall immediately give notice to Buyer of those facts and information. If any of the foregoing representations and warranties ceases to be true before the close of escrow, Buyer may elect to terminate this Agreement, in which case Buyer shall have no obligation to purchase the Subject Property. Buyer's failure to give Seller notice of its election to terminate this Agreement within ten (10) days of Seller's notice of an Exception Matter shall be deemed a waiver by Buyer of such Exception Matter. Except as provided in Section 6 with respect to delivery of title at closing, Seller shall have no obligation to cure or remedy any Exception Matter and Seller shall have no liability whatsoever to Buyer under this Agreement with respect to any such Exception Matter.

For the purposes of this Section 9, the phrase "to the best of Seller's knowledge" shall mean to the best of the actual present knowledge of Daniel Silver (without any independent investigation, research or inquiry, and with absolutely no personal liability).

10. **Buyer's Representations.** Buyer is a conservation organization having among its purposes the acquisition on behalf of the public of open space, scenic and recreational lands. Buyer is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1986 (as amended from time to time, the "Code") and is included in the "Cumulative List of Organizations" described in Section 170(c) of the Internal Revenue Code published by the Internal Revenue Service. Buyer is not a private foundation within the meaning of Section 509(a) of the Code. Buyer is qualified to do business in the State of Washington, and execution of this Agreement by Buyer and its delivery to Seller have been duly authorized and no further corporate action is necessary on the part of Buyer to make this Agreement fully and completely binding upon Buyer in accordance with its terms. Buyer's execution, delivery and consummation of this Agreement shall not result in any default or violation of any agreement or law by which Buyer is bound.

11. **Remedies Upon Default.** In the event Buyer defaults in the performance of its obligations under this Agreement, Seller shall have all remedies provided by law or equity. In the event the transaction does not close because Seller defaults in the performance of any of Seller's obligations under this Agreement, Buyer shall have as its sole and exclusive remedy the right to specifically enforce this Agreement or to receive, immediately upon demand, a refund of all Option consideration and reimbursement of Buyer's reasonable costs of entering into this Agreement, investigating the Subject Property, and otherwise preparing to purchase the Subject Property, not to exceed \$100,000. Buyer hereby releases any and all right to recover actual damages incurred as a result of Seller's default.

12. **Right to Inspect Subject Property.** During the term of this Agreement Buyer through its employees and agents may upon obtaining EPA's prior consent enter upon the Subject Property for the purpose of making inspections and investigations as Buyer deems appropriate and EPA approves, including, without limitation, performing environmental site assessments of the soils, waters and improvements on the Subject Property. All tests or inspections shall be at Buyer's expense, and Buyer shall indemnify and hold Seller and EPA harmless from and against any and all costs, claims or damages incurred or suffered by Buyer, its agents or employees, in performing such tests or inspections and Buyer shall indemnify, defend and hold Seller and EPA harmless from any claims, demands and causes of action for personal injury, property damage, remedial or response action or costs related to such action, mechanics' liens, violations of laws or breach of contract or lease that arise out of or are related to Buyer's activities on the Subject Property prior to Closing, including without limitation, Seller's and EPA's costs, expenses and attorney's fees, except to the extent such claims, demands or causes of action arise out of Seller's or EPA's negligence. Without expanding Buyer's obligations set forth above, it is understood that Buyer shall not be liable for or responsible for the discovery or reporting as required by law of any hazardous or environmental condition on the Subject Property. Notwithstanding anything to the contrary herein, this indemnity shall survive the termination of this Agreement. Buyer's entry shall be at reasonable times approved by EPA and in compliance with all laws, leases, and other agreements of Seller and EPA. Unless Seller has given its prior written consent, (i) no improvements shall be constructed upon the Subject Property, no materials, vehicles or equipment shall be placed or stored on the Subject Property except for the purposes of testing, and no construction activity shall be conducted on the Subject

Property, and (ii) no grading, filling, excavation or other disturbance of the soils shall be permitted. Buyer's activities shall not violate any law, regulation, ordinance or permit. Buyer will notify Seller and EPA in advance if and when it plans to conduct any inspection or investigations on the Subject Property. Buyer will provide to Seller and EPA a copy of any reports or assessments obtained by Buyer regarding the Subject Property.

13. **Risk of Loss.** All risk of loss shall remain with Seller until closing. In the event the Subject Property is destroyed or damaged after Buyer has exercised the Option and prior to close of escrow, Buyer may rescind this Agreement. Nothing in this paragraph shall be deemed to release Buyer from responsibility or liability for any damage or destruction caused by the acts of Buyer or Buyer's agents.

14. **Prorations and Fees.** Real property taxes on the Subject Property shall be prorated as of the close of escrow based upon the latest available tax bill. The escrow fee shall be divided equally between the parties. Seller shall be responsible for the excise tax due on the sale of the Subject Property to Buyer and the premium for the ALTA standard form owner's title insurance policy. Buyer shall pay the recording fee on the conveyance and any additional premium for an extended form title insurance policy or any endorsements. Other fees and charges shall be allocated in accordance with the customary practice of Kitsap County.

15. **Notices.** All notices pertaining to this Agreement shall be in writing and delivered to the parties hereto by confirmed facsimile transmission, personally by hand, courier service or Express Mail, or by certified class mail, postage prepaid, at the addresses set forth in Recital A. All notices shall be deemed given three (3) days after deposited in the mail, certified postage prepaid, addressed to the party to be notified; or, if delivered by hand, courier service or Express Mail, shall be deemed given when delivered; or, if transmitted by facsimile, shall be deemed given when transmitted. The parties may, by notice as provided above, designate a different address to which notice shall be given.

16. **Legal Costs.** If any legal action is brought by either party to enforce any provision of this Agreement, the prevailing party shall be entitled to recover from the other party reasonable attorneys' fees and court costs in such amounts as shall be allowed by the court including those on appeal.

17. **No Broker's Commission.** Each party represents to the other that it has not used a real estate broker in connection with this Agreement or the transaction contemplated by this Agreement. In the event any person asserts a claim for a broker's commission or finder's fee against one of the parties to this Agreement, the party against whom the claim is asserted will indemnify and hold the other party harmless from said claim.

18. **Time of the Essence.** Time is of the essence of this Agreement.

19. **Binding on Successors.** This Agreement shall be binding not only upon the parties but also upon their respective heirs, personal representatives, assigns, and other successors in interest.

20. **Memorandum of Option.** Concurrently with the signing of the Agreement the parties shall sign a Memorandum of Option in the form of Exhibit B, which is attached to this Agreement and incorporated herein by this reference. Buyer may cause the Memorandum of Option to be recorded in the real property records of Kitsap County, Washington, only after Seller has given Buyer written notice that the EPA has approved or ratified this Agreement and the transaction contemplated by this Agreement as described at Section 28. If the Buyer does record the memorandum of this Agreement and for any reason a sale shall not close, Buyer agrees to provide any and all documentation and to do whatever is necessary to remove said recording from the record title of the Seller.

21. **Additional Documents.** Seller and Buyer agree to execute such additional documents, including escrow instructions, as may be reasonable and necessary to carry out the provisions of this Agreement.

22. **Modification.** No supplement, modification, or amendment of this Agreement shall be binding and no waiver of any provision in this Agreement effective, unless executed in writing by all the parties.

23. **Oral Agreements and Representations.** There are no oral or other agreements, including but not limited to any representations or warranties, which modify or affect this Agreement. Seller shall not be bound by, nor liable for, any warranties or other representations made by any other person, partnership, corporation or other entity unless such representations are set forth in a written instrument duly executed by Seller. Buyer acknowledges to Seller that in entering into this Agreement, Buyer is not relying on any warranties except those expressly set forth herein.

24. **Nonmerger.** Except as specifically provided otherwise in Section 9, the terms and provisions of this Agreement shall not merge in, but shall survive, the closing of the transaction contemplated hereunder and the deed to be delivered pursuant hereto.

25. **Assignment of Buyer's Interest.** Buyer shall not assign its interest in this Agreement to any individual, entity, or organization without Seller's prior written consent, which may be withheld in Seller's sole discretion, and any purported assignment made without such consent shall be null and void.

26. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Washington.

27. **Counterparts and Execution.** This Agreement may be executed in counterparts, each of which shall be deemed an original and which together shall constitute one and the same agreement. Signatures required under this Agreement may be transmitted by facsimile and, once received by the party to the Agreement to whom such signatures were transmitted, shall be binding on the party transmitting its signatures as though they were an original signature of such party.

28. **Approval by EPA.** This Agreement shall automatically terminate on the day thirty (30) days from the date it is last signed by all parties unless on or before the expiration of such thirty (30) day period the EPA has approved or ratified this Agreement and the transaction contemplated by this Agreement.

29. **Additional Conditions Precedent.** The obligations of Buyer and Seller to complete the closing of the transaction or transactions contemplated by this Agreement are subject to and conditioned upon receipt by Buyer of a prospective purchaser agreement mutually acceptable to Buyer and EPA or its equivalent, no later than July 1, 2003. In addition, the obligations of Buyer and Seller to complete the closing of the transaction or transactions contemplated by this Agreement are subject to and conditioned upon the satisfaction or written waiver by Buyer and Seller of the following conditions precedent in addition to any other conditions precedent set forth within this Agreement: (a) mutual acceptance no later than July 1, 2003 of the form and substance of the EPA Access Rights, Covenants and Use Restrictions described in Section 6, (b) mutual acceptance of the description of each phase of the Subject Property if Buyer elects to purchase the Subject Property in more than one phase as described in Section 2, (c) satisfactory completion of any Parcel Segregation required in connection with Buyer's exercise of the Option as to any phase of the Subject Property as described in Section 2. If Buyer and Seller shall fail to satisfy each of the foregoing conditions precedent prior to the dates set forth in this paragraph or, if no date is specified, prior to the date of any closing under this Agreement, then this Agreement shall terminate, the escrow shall be cancelled, all Option consideration paid by Buyer to Seller shall be refunded to Buyer, and neither party shall have any further obligation to the other under this Agreement except for indemnity and other obligations intended to survive the expiration or termination of this Agreement.

30. **AS-IS.** Except for the Section 9 representations and warranties, Buyer acknowledges that Seller has made no representations or warranties, and Buyer accepts the Subject Property in its current condition "As Is - Where Is." The use of the term "as is" within this Agreement shall mean "as is" except to the extent provided otherwise in Seller's express representations and warranties within this Agreement. SELLER MAKES NO REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, REGARDING THE PROPERTY INCLUDING, WITHOUT LIMITATION: ANY REPRESENTATION OR WARRANTY WITH RESPECT TO (A) THE QUALITY, NATURE, ADEQUACY AND PHYSICAL CONDITION OF THE PROPERTY, INCLUDING, BUT NOT LIMITED TO, ACCESS, SOILS, GEOLOGY, ANY GROUND WATER OR ANY ENVIRONMENTAL CONTAMINATION, HAZARDOUS SUBSTANCES, OR MATERIALS; (B) THE EXISTENCE, QUALITY, NATURE, ADEQUACY, AND PHYSICAL CONDITION OF UTILITIES SERVING THE PROPERTY; (C) THE PROPERTY'S USE, HABITABILITY, MERCHANTABILITY, OR FITNESS, SUITABILITY, VALUE OR ADEQUACY OF THE PROPERTY FOR ANY PARTICULAR PURPOSE; (D) THE ZONING OR OTHER LEGAL STATUS OF THE PROPERTY OR ANY OTHER PUBLIC OR PRIVATE RESTRICTIONS ON USE OF THE PROPERTY; (E) THE COMPLIANCE OF THE PROPERTY OR THE PROPERTY'S OPERATION WITH ANY APPLICABLE CODES, LAWS, REGULATIONS, STATUTES, OR ORDINANCES OF ANY GOVERNMENTAL OR QUASI-GOVERNMENTAL ENTITY OR ANY COVENANTS, CONDITIONS AND RESTRICTIONS APPLICABLE TO THE PROPERTY. SELLER SHALL HAVE NO



LIABILITY OR OBLIGATION FOR, AND BUYER EXPRESSLY AND SPECIFICALLY RELEASES AND DISCHARGES SELLER FROM, ANY AND ALL CLAIMS ARISING OUT OF OR RELATING TO THE CURRENT CONDITION OF THE SUBJECT PROPERTY.

IN WITNESS of the foregoing provisions the parties have signed this Agreement below:

SELLER:

PACIFIC SOUND RESOURCES

By: [Signature]

Title: President

Date: April 14, 2003

BUYER:

THE TRUST FOR PUBLIC LAND, a  
California nonprofit public benefit  
corporation

By: [Signature]

Title: REGIONAL COUNSEL

Date: APRIL 11, 2003

#### ACKNOWLEDGMENTS

STATE OF WASHINGTON )

COUNTY OF THURSTON )

ss.

On this 14 day of APRIL, 2003, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared DANIEL SILVER to me known to be the President of PACIFIC SOUND RESOURCES, and executed the foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of PACIFIC SOUND RESOURCES, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute the said instrument.

WITNESS MY HAND AND OFFICIAL SEAL here to affixed the day and year first above written.

[Signature]  
NOTARY PUBLIC in and for the State of  
Washington, residing at [Signature]  
My commission expires 03/19/05  
Print Name Julie Bunning

State of Washington )  
 ) ss.  
County of King )

On this 11<sup>th</sup> day of April, 2003, before me, the undersigned Notary Public in and for the state of Washington, personally appeared Thomas E. Tyner, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person who executed the within instrument as Regional Counsel, on behalf of The Trust for Public Land, the corporation therein named and acknowledged to me that the corporation executed said instrument as its free and voluntary act and deed for the purposes therein mentioned, and on oath stated that he was authorized to so execute said instrument.



Daniel K. Wilson  
Print Name: DANIEL K. WILSON  
NOTARY PUBLIC in and for the State of  
Washington residing at Seattle  
My appointment expires: 02/04/06

**EXHIBIT A**

**DESCRIPTION OF SUBJECT PROPERTY**

EXHIBIT A

DESCRIPTION OF SUBJECT PROPERTY

LEGAL DESCRIPTION (AS PUBLISHED BY METROSCAN)

**MetroScan Full Legal**

**APN:3525 021 001 20**

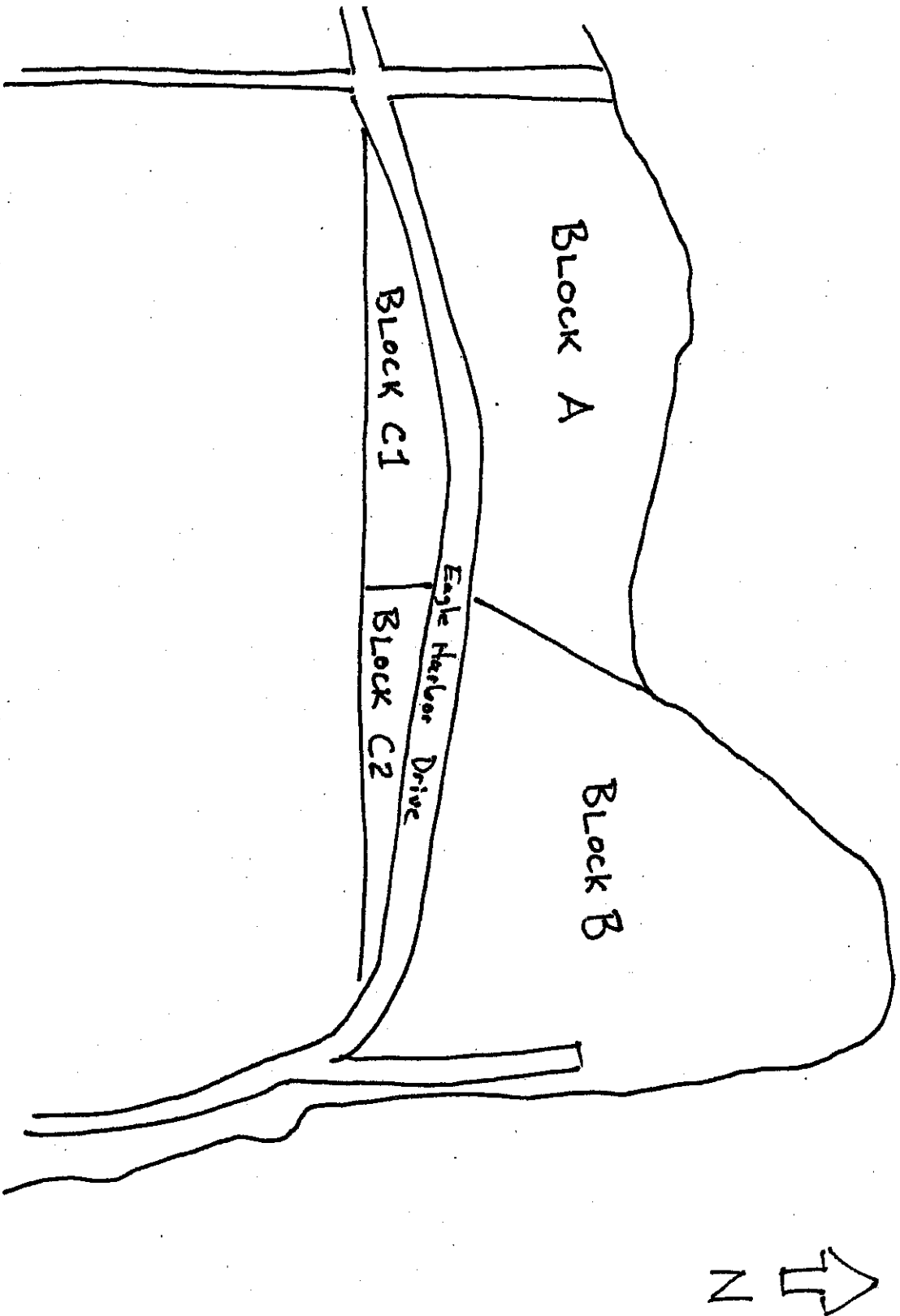
GOVERNMENT LOT 3 EXCEPT EAGLEDALE CREOSOTE ROAD. TOGETHER WITH 2ND CLASS TIDELANDS ADJOINING TO LINE OF EXTREME LOW TIDE AND EXCEPT COUNTY ROAD NO. 10 & 49. TOGETHER WITH THAT PORTION OF VACATED ROAD TO THE SOUTH PER COMMISSIONERS JOURNAL VOLUME 18, PAGE 129, WHICH UPON VACATION ATTACHED TO SAID PREMISES BY OPERATION OF LAW.

**MetroScan Full Legal**

**APN:3525 021 002 20**

L 4 & TL F L 4 EX TO CO RD & EX TO EAGLEDALE CREOSOTE RD

	Location	Approx. Area	Price
Block A	West End	18 acres	\$4,600,000
Block B	East End	24.5 acres	\$2,500,000
Block C1	Southwest End	2.5 acres	\$300,000
Block C2	Southeast End	4.5 acres	\$600,000
Total		49.5 acres	\$8,000,000



## EXHIBIT B

### FORM OF MEMORANDUM OF OPTION

When recorded mail to:

THE TRUST FOR PUBLIC LAND  
1011 Western Avenue, Suite 605  
Seattle, WA 98104  
Attn: Thomas E. Tyner  
(206) 587-2447

### MEMORANDUM OF OPTION

This is a Memorandum of a certain Option Agreement (the "Option Agreement") dated as of April 11, 2003, between Pacific Sound Resources, as seller ("Seller"), and The Trust for Public Land, a California nonprofit public benefit corporation, as buyer ("Buyer"). By said Option Agreement, Seller has granted to Buyer an exclusive option (the "Option") to purchase that certain real property located in Kitsap County, Washington, described on Exhibit A attached hereto (the "Subject Property").

The Option shall be effective as of the date the Option Agreement is last signed (the "Effective Date") and shall expire on June 30, 2004, subject to the rights of the parties to either extend or terminate the option as set forth in the Option Agreement.

This Memorandum is made by Buyer and Seller to impart constructive notice of the existence of the Option. Nothing in this Memorandum is intended to modify, amend or interpret the Option Agreement and in the event of any conflict between the terms of this Memorandum and the terms of the Option Agreement, the Option Agreement shall control.

IN WITNESS of the foregoing provisions the parties have signed this Agreement below:

SELLER:

PACIFIC SOUND RESOURCES

By: 

Title: President

Date: April 14, 2003

BUYER:

THE TRUST FOR PUBLIC LAND, a  
California nonprofit public benefit  
corporation

By: 

Title: REGIONAL CANCEL

Date: APRIL 15, 2003

## ACKNOWLEDGMENTS

STATE OF WASHINGTON )

COUNTY OF Thurston )

ss.

On this 14 day of April, 2003, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Daniel J. Silver, to me known to be the President of PACIFIC SOUND RESOURCES that executed the foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of PACIFIC SOUND RESOURCES, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute the said instrument.

WITNESS MY HAND AND OFFICIAL SEAL hereto affixed the day and year first above written.

[Signature]  
NOTARY PUBLIC in and for the State of  
Washington, residing at Thurston

My commission expires 03/19/05

Print Name Daniel J. Silver

State of Washington )

) ss.

County of King )

On this 15<sup>th</sup> day of April, 2003, before me, the undersigned Notary Public in and for the state of Washington, personally appeared Thomas E. Tyner, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person who executed the within instrument as Regional Counsel, on behalf of The Trust for Public Land, the corporation therein named and acknowledged to me that the corporation executed said instrument as its free and voluntary act and deed for the purposes therein mentioned, and on oath stated that he was authorized to so execute said instrument.



[Signature]  
Print Name: DANIEL K. WILSON  
NOTARY PUBLIC in and for the State of  
Washington residing at Seattle  
My appointment expires: 02/04/06



## EXHIBIT 2

### **“EPA Access Rights, Covenants and Use Restrictions, a/k/a ‘Institutional Controls’”**

1. The above title without “a/k/a ‘Institutional Controls,’” was taken from Section 6 of the Option Agreement (Exhibit 1 to the Agreement to which this document is Exhibit 2) executed by the buyer and seller in April 2003. Because the EPA model format for Prospective Purchaser Agreements comprehensively covers EPA Access Rights, such rights are not addressed in this document. Similarly, since there are no outstanding Covenants to consider, and Use Restrictions are generally subsumed under the broader category of EPA remedial action known as Institutional Controls, the “a/k/a” was added to the title of this Exhibit by the Parties to the Agreement who agree that this document, with the text of the Agreement, meets the intent of the parties to Exhibit 1 in their reference to this document in Section 6 of Exhibit 1.

2. In accordance with Paragraph 19 of the Agreement, EPA identified Institutional Controls in the form of use restrictions and/or limitations in the *East Harbor Operable Unit Wyckoff/Eagle Harbor Superfund Site Record of Decision*, (Section 10.2.3) dated September 1994 (EH ROD), and in the *Wyckoff/Eagle Harbor Superfund Site Soil and Groundwater Operable Units Bainbridge Island, Washington Record of Decision* (Declaration, Section 9.1, and Section 12.1), dated February 2000 (S&G ROD). In addition:

a. The no-anchor zone established in accordance with the EH ROD is physically larger than the existing area of sediment capping. EPA will upon request supply the United States Coast Guard (USCG) with precise information regarding the extent of existing capping to assist the USCG in considering a request by Settling Respondent for a waiver in a portion of the no anchor zone consistent with the no anchor zone listing in the Federal Register. EPA has no current plans for or projection of future sediment capping within the no anchor zone, however future capping and other remedial action, within the no anchor zone and beyond it, related to environmental conditions at the Site cannot be ruled out at this time.)

b. In accordance with the S&G ROD, EPA excavated contaminated soil from the Former Log Storage/Peeler Area to meet the substantive requirements of MTCA Method B. This remedial action has been completed and confirmation soil sampling, as documented in the Soil Removal Report Former Log Storage/Peeler Area dated February 28, 2003, indicates that the soils in this area meet this standard; therefore, no additional land use restrictions are anticipated at this time for the protection of human health or the environment.

c. Pursuant to the S&G ROD, EPA created and/or restored approximately 1500 linear feet of shoreline and approximately 1.5 acres of intertidal habitat, including a coastal vegetated buffer. The vegetated buffer was constructed to: (1) provide separation between functioning intertidal habitat and upland human activity; (2) moderate the impacts of stormwater runoff by stabilizing soils, providing erosion control and filtering suspended solids; and (3) provide essential habitat for fish and upland shoreline wildlife for use in feeding, breeding, rearing, and cover from predators. Any activities by the Settling Respondent shall be consistent with maintenance of the created and/or restored shoreline and vegetated buffer.

d. For development setback requirements along the habitat mitigation beach, the Settling Respondent shall use the standards for recreational development in the Conservancy Shoreline Environment as specified in the Bainbridge Island Shoreline Master Program (Bainbridge Island Municipal Code 16.12.150 Table 4-2 or its successor) and the Shoreline Management Act [see RCW 90.58 or its successor and WAC 173-22].

3. Settling Respondent shall not alter, modify, or remove any existing structures or caps implemented or installed as environmental response action, or such structures or caps which may come to exist as a result of future remedial action at the Site, in any manner that may damage or adversely affect the integrity or function of any structure or cap.

4. Consistent with Paragraph 21 of the Agreement, the Settling Respondent may share plans with EPA with regard to its projected Park Use and Development Activities, such as a projected Soil Management/Construction Contingency Plan, and seek such informal advice or assistance as EPA may be able to provide.

5. With the exception of withdrawals from the existing on-site water supply well, Well 01-CT01, and unless otherwise agreed to by EPA, Settling Respondent shall not install wells nor withdraw, nor allow third parties to withdraw, groundwater from the Property.

6. Settling Respondent must obtain written approval from EPA prior to any proposed use of the Property that is inconsistent with this Exhibit or the Agreement. As set forth in the Agreement, subsequent institutional controls may be developed and selected by EPA in future Record(s) of Decision or ROD Amendment(s), and the City agreed in Paragraph 19 of the Agreement to implement such institutional controls in the form of use restrictions and/or limitations which may require recording in a manner substantially similar to that set forth in Paragraph 19. This Exhibit may be modified or amended by the Parties to further clarify Settling Respondent's limitations, obligations or responsibilities.